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In the
Supreme Court of the United States

APRIL TERM, 1956

HENRY FERGUSON,

Petitioner,

v.

MOORE-McCORMACK LINES, INC.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioner, Henry Ferguson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which reversed the judgment of the United States District Court for the Southern District of New York, entered in favor of the Petitioner on a jury verdict, in a seaman's Jones Act case.

The Opinion of the Court Below.

No opinion was rendered in the District Court.

The opinion of the United States Court of Appeals for the Second Circuit by Judge Harold R. Medina is printed in the appendix hereto (pp. 15-16) and also annexed to the record of the Court below (D. App. 127-129)* and is reported in 228 F. 2d 891.

* Numerals following the letters "D. App." in parentheses refer to pages in Defendant-Appellant's appendix in the Court of Appeals and filed here.

Jurisdiction.

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided and entered on January 18, 1956, and is printed and annexed to the record of the Court below (D. App. 130-131).

This cause is brought under the Jones Act (46 U.S.C.A. 688) and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented.

1. When a shipowner negligently fails to provide a necessary simple tool and a seaman in order to do his work uses a hazardous tool and suffers injury in its use, must he prove that the shipowner could reasonably foresee the use of the hazardous tool in order to make out a case under the Jones Act?
2. Is the defense of assumption of risk still available to a shipowner who negligently fails to provide a necessary simple tool but cannot reasonably foresee that a hazardous tool will be used to do the work in the absence of a necessary one?
3. Where a jury on ample evidence has found that a seaman was impliedly ordered to use a hazardous simple tool, does he assume the risk even though he used it in obedience of orders?
4. Where a jury on ample evidence has found that a shipowner could reasonably anticipate that a seaman would use a hazardous tool to do his work in the absence of a

necessary one, may such a jury finding be set aside in a Jones Act case in which the seaman has a statutory guaranty of trial by jury?

Statutes Involved.

The Jones Act, 41 Stat. 1007, 46 U.S.C.A. 688. The Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C.A. 51; 35 Stat. 66, 45 U.S.C.A. 54.

Statement of the Case.

Petitioner, a seaman, sued under the Jones Act for damages for personal injuries sustained because of Respondent's negligence (D. App. 1-3). At the end of Petitioner's case in the District Court, Respondent moved for a directed verdict; its motion was denied; Respondent then rested without offering any proof (R. 203-205, 206).^{*} The jury returned a verdict for Petitioner for \$17,500; the trial judge again denied Respondent's motions and judgment was entered for Petitioner (R. 261, 263). The Court of Appeals reversed, holding that Respondent's "motion for a directed verdict should have been granted" (App. pp. 15, 16).

Petitioner was employed by Respondent as a baker on its S.S. Brazil and it was one of his duties to fill the order of the ship's waiters for ice cream (R. 59, 60). On March 27, 1950, at about 8:40 p.m., Petitioner received an order from a ship's waiter for 12 portions of ice cream (R. 60, 70). The ice cream was in a 2½ gallon container setting in a refrigerated tempering chest in the bake shop (R. 63-66, 195, 196; see Plaintiff's Exs. 3A and 3E). Petitioner had been filling orders for ice cream from this container but when he got about half way down in the container, he found the ice cream "hard as a brickbat"; it was so hard that the hemispherical

^{*} Numerals following the letter "R" in parentheses refer to pages in the typewritten record of the trial, now filed in this Court.

scoop, the only tool Respondent provided for the work, was useless because it could not penetrate the ice cream (R. 60-62, 66-68, 72). Respondent did not provide a necessary tool for filling orders when the ice cream was too hard for the use of the scoop. An ice chipper (plaintiff's Ex. 5) would have broken the hard ice cream into small particles which could have been made into balls by the scoop; petitioner had used such a tool in that way in serving hard ice cream on other ships (R. 72-74). Petitioner worked under a superior, the ship's chef, who gave him this order: "When the waiters come up to get the orders, that they should get what they ask for and give them good service" (R. 71, 72). Lacking the essential ice chipper and under the compulsion of the chef's orders and the waiter's order for 12 servings, Petitioner took a ship's butcher knife kept nearby, grasped it and using it as a chipper, chipped the hard ice cream into small pieces which he formed into balls with the scoop to fill the order (R. 60-62, 69, 70). He made nine servings that way when the point of the knife struck a spot in the ice cream which was so hard that it caused his hand to slip down the blade of the knife and he suffered an injury resulting in 60 per cent loss of the functional use of his right hand (R. 70, 186).

Respondent stored its ice cream in a refrigerated box at 5 degrees below zero (R. 47, 48). Such ice cream is too hard to serve and must be transferred to a tempering chest and kept there at 8 to 13 degrees above zero for 12 to 24 hours before the entire contents of a 2½ gallon container becomes soft enough for dispensing with a scoop (R. 178-180, 198, 199). Respondent's tempering chest was set at zero to 10 degrees above zero which was too low for proper tempering or thawing of ice cream (R. 158). The tempering chest was not in good mechanical condition; Respondent's refrigerating engineer (Respondent took his deposition and Petitioner read it at the trial, R. 2, 3), testified that he could not say whether the chest was in working order and condi-

tion on the day of the accident (R. 16, 17); that they had trouble with it then and still have trouble with it which they cannot correct (R. 25, 26, 42), and that no readings of the temperature in the chest were made or kept (R. 37, 38). Respondent did not keep its ice cream in the tempering chest a sufficient length of time to become serviceable by means of a scoop. In answer to an interrogatory as to when ice cream for the evening meal was transferred to the tempering chest, Respondent answered: "Between the noon and evening meals if there was then an insufficient amount for the evening service already available" (R. 157). Petitioner testified that the ice cream for the evening meal was usually brought up about 1:00 o'clock in the afternoon (R. 77-79) but he did not know when the ice cream he was working on at the time he was injured was placed in the chest (R. 150-152).

Petitioner had nothing to do with the storage of the ice cream or its transfer to the tempering chest (R. 74), his only job with respect to ice cream was filling the orders of the waiters (R. 59).

As the uncontradicted proof shows that Respondent did not maintain its tempering chest at a proper temperature and did not keep its ice cream in the chest long enough to become serviceable throughout the container, Respondent knew that the sole tool it furnished Petitioner to serve ice cream with was not adequate for the work.

The Court submitted the case to the jury on well established principles of maritime law; that Respondent owed Petitioner the duty of providing a safe place in which to work, safe and adequate tools to do the work, safe ice cream on which to work, and that Respondent was chargeable with knowledge of the condition of its ice cream; that Petitioner, a seaman, was bound to obey the implied as well as expressed orders of his superiors (D. App. 98-122).

The Circuit Court of Appeals reversed on the sole ground that the use of the knife as an ice chipper, which Respondent failed to supply, "was not within the realm of reasonable foreseeability" (App. pp. 15, 16).

REASONS FOR ALLOWANCE OF THE WRIT.

ARGUMENT.

The common law doctrine of "reasonable foreseeability" of harm has never before been applied to defeat recovery in a Jones Act case based on a defective appliance or failure to provide an adequate one. In applying the doctrine, the United States Court of Appeals for the Second Circuit has established a new rule of law—which permits a shipowner to supply defective appliances and fail to provide adequate or necessary ones unless he can reasonably foresee harm from his conduct—which is contrary to public policy, decisions of this Court, and other United States Courts of Appeal as well as its own prior decisions.

A shipowner has an absolute non-delegable duty of providing his seamen with safe, adequate and necessary appliances to carry out their work and the exercise of due diligence does not discharge that duty, *Pacific American Fisheries v. Hoof*, 9 Cir., 291 Fed. 306, certiorari denied 263 U.S. 712, 44 S. Ct. 38, 68 L. Ed. 520; *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 66 L. Ed. 927, 42 S. Ct. 475; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561; *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262. The duty is recognized by the common law in non-maritime torts, *Mahnich v. Southern S.S. Co.* (supra). The duty is a continuing one which lasts all during the seaman's employment, *Pacific American Fisheries v. Hoof* (supra); *Cleveland-Cliffs Iron Co. v. Martini*, 6 Cir., 96 F. 2d 632. While breach of the duty may be enforced by an action

at law for unseaworthiness. *Seas Shipping Co. Inc. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, it also may be enforced by an action for negligence under the Jones Act. *Socony-Vacuum Oil Co. v. Smith* (supra); *Krey v. United States*, 2 Cir., 123 F. 2d 1008. As the duty is non-delegable, not discharged by the exercise of due diligence, and is a continuing one, the shipowner's actual knowledge of breach of the duty need not be proved for it is always imputed to him. *Pacific American Fisheries v. Hoof* (supra). Therefore, the mere breach of the duty satisfies the negligence requirements of the Jones Act, *Storgard v. France & Canada S.S. Corp.*, 2 Cir., 263 Fed. 545, certiorari denied 252 U.S. 585, 40 S. Ct. 394, 64 L. Ed. 729; *Krey v. United States* (supra). This is so even where the shipowner has surrendered possession and control of his vessel to another, *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 25 F. 2d 339, aff'd 2 Cir., 32 F. 2d 182, and where the defective appliance is set up by an independent contractor, *Shields v. United States*, 3 Cir., 175 F. 2d 743. Mere breach of the similar duty to provide a safe place to work satisfies the negligence requirements of the Federal Employers' Liability Act where the injury was sustained on the property of another over which the railroad had neither knowledge nor control, *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 8 Cir., 165 F. 2d 473.

To impose an additional element of negligence—"reasonable foreseeability" of harm—in Jones Act appliance cases, is to require proof of actual rather than imputed knowledge and to establish a new and novel rule of law permitting a shipowner to provide a defective appliance and to fail to supply an adequate or necessary one where there is no "reasonable foreseeability" of harm. Such a rule would permit the shipowner to escape liability in many instances for breach of his absolute duty to provide safe, adequate and necessary appliances.

Until this novel decision of the Court below, we knew of no decision in a Jones Act appliance case holding "reason-

able foreseeability" of harm a pre-requisite of recovery. The authorities cited by the Court below to support its holding do not do so and are not at all in point. *Manhat v. United States*, 2 Cir., 220 F. 2d 143, certiorari denied 349 U.S. 966, 75 S. Ct. 900, 99 L. Ed. 1288, did not involve a defective appliance or lack of an adequate one. It was a third party action brought by a repairman who sustained injury when one of his co-employees working inside a lifeboat with him released obvious, safe and proper lowering gear causing the boat to fall. The Court held that such an occurrence could not be foreseen. *Fitzpatrick v. Fowler*, D.C. Cir., 168 F. 2d 172, was a suit by a shoreside domestic servant for injuries sustained when she was tripped and fell in a hole on the floor covering on her working place. The Court held that she assumed the risk because she had knowledge of the defect when injured. In *Wm. Johnson & Co. Ltd. v. Johansen*, 5 Cir., 86 Fed. 886, a seaman was given new, unpliant rope and too short a toggle pin for use in rigging a boatswain's chair which caused it to fall while he was sitting in it and painting the mast. Although the seaman did not question the materials furnished and he could have obtained more suitable material or secured the chair in another way, the Court held he did not assume the risk but was guilty of contributory negligence and halved his damages.

Strangely, 36 years ago in a frequently cited case, *Storgard v. France & Canada S.S. Corp.* (supra), the Court below rejected the very doctrine of "reasonable foreseeability" it now enunciates; there a seaman, in ascending a mast, used a ring attached to a sail; the ring was not designed for that purpose and a defective bolt attached to it caused an injury; the seaman's action was one in negligence for maintaining a defective appliance and the Court of Appeals, in speaking of the shipowner's liability, said:

"* * * It makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."

This Court did not apply the doctrine of "reasonable foreseeability" of harm in defective appliance cases clearly calling for its application if it were available to the shipowner, *Mahllich v. Southern S.S. Co.* (supra); *Socony-Vacuum Oil Co. v. Smith* (supra). In both cases the shipowner provided a safe appliance and a seaman voluntarily selected an unsafe one, yet in fastening liability on the shipowner for breach of duty, this Court did not even discuss the doctrine.

This Court has often held that the Jones Act is remedial and designed to enlarge the rights of seamen; that in drawing from maritime and common law sources, Courts wherever necessary should liberalize the rules rather than restrict them by a refined process of reasoning or resort to old discredited common law concepts, *Jamison v. Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368; *De Zon v. American President Line*, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065. It would be an anomaly to permit a duty recognized by the general maritime law and the common law to be watered down and restricted where the Jones Act is invoked to enforce it.

The contributory negligence rule as applied in Admiralty gives the shipowner ample protection against the seaman's negligence in selecting a hazardous appliance when a safe one is available or, as here, in using a hazardous tool where a necessary one is not provided, *Socony-Vacuum Oil Co. v. Smith* (supra).

As the United States Court of Appeals for the Second Circuit has pronounced a new rule of law completely out of harmony with its own prior decisions as well as the decisions of this Court and other United States Courts of Appeal, and as the rule may be seized upon to overrule established precedent and impair the harmony of our maritime law, we respectfully ask this Court to decide whether "reasonable

foreseeability" of harm is a necessary element of proof in a Jones Act case based on failure to provide a necessary appliance.

The shipowner has the same duties and liability with respect to simple tools that he has as to other appliances.

The Court of Appeals did not take notice of the fact that the tool which Respondent failed to provide—an ice chipper—and the tool Petitioner adopted in place of the ice chipper—a knife—were simple tools. In *Jacob v. City of New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, this Court held that the common law simple tool doctrine had no application in Jones Act cases. There the shipowner provided a monkey wrench "probably" adequate for the job but failed to replace a more adaptable type wrench which was worn and defective, after three requests for a new one had been made. A seaman chose the worn wrench and was injured. This Court held that the case should not have been dismissed as the evidence presented a jury question of whether the injury arose out of any "defect or insufficiency of appliances." In reviewing what the jury might find from the evidence, this Court said it might consider "whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use." Foreseeability of harm was one of the elements of negligence in the case as a request for a new wrench had been made three times, but it was not a necessary element as the authorities heretofore submitted demonstrate, and as this Court made no distinction between liability for simple tools and other tools and appliances, certainly the Court did not intend to establish a different rule in simple tool cases. We know of no authority holding that it did.

As the shipowner's liability in simple tool cases is a matter

of great importance to the maritime industry and this Court has made no pronouncement on the subject since its decision in *Jacob v. City of New York* (supra), fourteen years ago, we respectfully ask this Court to decide whether in cases invoking the Jones Act a shipowner's liability based on failure to provide a necessary appliance is any different, where the appliance is a simple tool.

The common law doctrine of "reasonable foreseeability" sets up the defense of assumption of risk no longer available in seamen's appliance cases. The rule is no different in simple tool cases.

The United States Court of Appeals in applying the doctrine of "reasonable foreseeability" in effect held that although Respondent was negligent in failing to supply an adequate tool that Petitioner assumed the risk when he selected the hazardous knife to do his work. The Court thereby invoked a defense no longer available in seamen's appliance cases, *Socony-Vacuum Oil Co. v. Smith* (supra). There this Court held that a seaman who "could have avoided the use of the unsafe appliance by the free choice of a safe one" did not assume the risk and said:

"* * * we feel confident that a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice."

Petitioner had no choice of a safe tool. He had to weigh the alternatives of stopping the work and refusing to fill the order, or using the hazardous knife; and unlike Smith, he did not have a free and uncoerced choice of alternatives because of the orders of his superior, the chef, to give the waiters what they ordered and give them good service, and the order of the waiter for 12 portions of ice cream.

Under the Court's charge (D. App. 98-122), the jury verdict is a finding that Petitioner was impliedly ordered to use the knife. He was duty bound to obey such order, *Ruskin v. Minnesota Atlantic Transit Co.*, 2 Cir., 107 F. 2d 743. Long before the defense of assumption of risk was abolished by *Socony-Vacuum Oil Co. v. Smith* (supra), and later by the Federal Employers' Liability Act (35 Stat. 66, 45 U.S.C.A. 54) where injury resulted from negligence, the Court below and this Court held that a seaman did not assume the risk of using a defective appliance in obedience of orders as he is bound to obey them, *Panama R. Co. v. Johnson*, 2 Cir., 289 Fed. 964, aff'd 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. But in denying recovery, the Court below necessarily held that a seaman is not duty bound to obey the expressed and implied orders of his superiors if they require the use of a dangerous appliance. This is contrary to bedrock maritime law declared by the Court below in *Darlington v. National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817.

We have found no other authority holding that a seaman might refuse an order to use a defective or hazardous simple tool, or that he assumed the risk in using such a simple tool in obedience of orders. In *Socony-Vacuum Oil Co. v. Smith* (supra), this Court impliedly indicated that assumption of risk is not a defense in simple tool cases for in concluding its opinion, the Court said:

"We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty."

In *Jacob v. City of New York* (supra), this Court held that the simple tool doctrine did not apply to Jones Act cases, thereby placing simple tools in the same category with other appliances.

As the question is one of great importance to the maritime industry, we respectfully urge this Court to decide whether assumption of risk is a defense in simple tool cases.

Implicit in the jury verdict is a finding that respondent could have anticipated or foreseen that petitioner would use the knife in his work. In reversing, the United States Court of Appeals refused to respect that finding and thereby deprived petitioner of his right to trial by jury given to him by the Jones Act.

The trial judge did not charge the jury that Petitioner could not recover unless Respondent could have reasonably foreseen that he would use the knife (D. App. 98-122) and Respondent did not request such a charge (D. App. 95-98). The trial judge did charge that one of the elements the jury might consider was whether Respondent could have anticipated that Petitioner would use the knife (D. App. 107). The Court below refused to accept the jury's affirmative answer to that question and substituted its own finding for that of the jury, in holding that the use of the knife "was not within the realm of reasonable foreseeability"; it thereby usurped the jury's function and deprived Petitioner of the right to trial by jury given to him by the Jones Act. This Court condemned that practice in Jones Act cases in *Jacob v. City of New York* (supra). There the United States Court of Appeals for the Second Circuit (the Court below) affirmed the District Court in a similar case in refusing to submit to the jury defendant's neglect in failing to provide a more adequate wrench, and this Court said:

"But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury."

We respectfully urge that this Court reaffirm the seaman's "statutory guaranty of the right of jury trial" in Jones Act cases, as it has done so often in cases under the Federal Employers' Liability Act.

CONCLUSION.

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

GEORGE J. ENGELMAN,

Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—October Term, 1955

(Argued December 12, 1955 Decided January 18, 1956)

Docket No. 23586

HENRY FERGUSON,

Plaintiff-Appellee,

v.

MOORE-McCORMACK LINES, INC.,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and
MEDINA and WATERMAN, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York. Edward Conger, *Judge*.

Defendant appeals from a judgment for plaintiff entered on the verdict of a jury in an action brought under the Jones Act, 46 U. S. C. Section 688. *Reversed.*

GEORGE J. ENGELMAN, New York City, for
plaintiff-appellee.

DOW & SYMMERS, New York City (Wilbur E. Dow, Jr. and John R. Sheneman, New York City, of Counsel), for *defendant-appellant.*

MEDINA, *Circuit Judge*:

Plaintiff was a baker engaged at the time of the accident in serving ice cream in the galley on C deck of defendant's

SS Brazil. Using the standard ice cream scoop provided for the purpose, plaintiff disposed of the contents of a half used tub and had worked his way about half way down a full additional tub. There he found the ice cream "as hard as a brickbat," and the scoop became useless. So it occurred to plaintiff that about a foot and a half from where he was serving and "kept underneath the griddle" was a butcher knife, about eighteen inches long and as sharp as a razor, which might be used to chip the ice cream into small pieces. He was chipping away when his hand slipped and he was badly cut, resulting later in the loss of two fingers of his right hand.

Strangely enough there is no claim that the vessel was unseaworthy. The negligence is supposed to stem from a failure to provide a safe place to work and safe tools and appliances. Reliance is also placed upon the fact that plaintiff had been directed to fill the orders brought into the galley by the waiters and it is said that there must have been something wrong with the refrigeration system or the ice cream would not have been so hard.

But no one in authority told plaintiff to use the butcher knife, which was customarily used in cutting French bread. The knife was properly in the galley and there was nothing defective about it. But it was never designed for or intended to be used as a dagger or ice pick for chipping frozen ice cream. And that it would be put to such use was not within the realm of reasonable foreseeability. *Manhat v. United States*, 2 Cir., 1954, 220 F. 2d 143, cert. denied, 349 U. S. 966. Cf. *Fitzpatrick v. Fowler*, D. C. Cir., 168 F. 2d 172; *Wm. Johnson & Co. Ltd. v. Johansen*, 5 Cir., 86 Fed. 886.

There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted.

Reversed.